

Using trespass in newsgathering

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 27 October 2010

1. It doesn't happen often in New Zealand, but sometimes media use disreputable methods to obtain stories. One of these is trespass. Unauthorised entry on to another's land is a trespass and is wrongful. The occupier of the land may bring a civil action for damages and, in some circumstances, a criminal prosecution may also result.
2. Doorstepping is a classic example - where reporters, usually accompanied by a camera crew, approach a person at the door of their home or business premises with the intent of interviewing and (usually) filming them. Sometimes both the reporter and camera crew enter the premises; sometimes only the reporter does, leaving the camera crew filming proceedings from outside.
3. The important question is what whether there has been 'unauthorised' entry, because if you come on to my land with my permission you commit no wrong. Permission can be implied however. The law treats everyone as having an implied permission or licence to come to my door to ask if they can speak to me or otherwise do business with me. You only become a trespasser when it has been made clear to you that I do not want you on my land; a request by me to leave, or a general notice at my gate (for example 'No Salesmen') would have that effect.
4. Thus, reporters commit no trespass by going to a house and knocking on the door, or to business premises and presenting at the counter, with intent to ask the occupier questions. If told to leave they must do so. It would be totally different, however, if they initially entered the property not intending to communicate with the occupier but simply to 'snoop'; they would then be trespassers from the instant of entry.
5. In New Zealand, courts have employed a test that requires an examination of the reporter's motives: if he or she has a purpose that he or she knows the occupier would not consent to, there is a trespass. An example is *TV3 Network Services Ltd v. Broadcasting Standards Authority* (1995) where a reporter had gone on to private premises to interview a woman. While the woman knew that the person was a reporter and was prepared to talk,

what she did not know was that a television camera on a neighbouring property was filming the interview. The Chief Justice believed that the reporter had committed trespass. While it is quite legitimate for a reporter to go on to private property with the purpose of interviewing someone, the Chief Justice believed that the purpose in this case was to enable film to be taken of the person whether or not she consented to be interviewed.

6. Difficult questions can arise when reporters and/or camera crew enter premises for purposes going beyond the extent of any implied licence. A number of Australian cases feature strongly in this area. In *Lincoln Hunt Australia Pty Ltd v. Willesee* a television crew entered the reception area of business premises with cameras rolling, taking pictures of the office lobby and other rooms. This was held to be a trespass from the moment of entry; the implied licence to enter extended only to those entering to do business with the firm. An even stronger case is *Rinsale Pty Ltd v. Australian Broadcasting Corporation* where it was held to be a trespass when journalists, having been refused an interview, entered premises with cameras rolling and entered a room where the plaintiff's director was subjected to questioning by the reporter. In the light of the fact that an interview had been refused, it was held that there was a trespass from the moment of entry; there could be no suggestion that an implied licence existed.

7. I want to focus today on a 2008 case, however, because it illustrates that it is not a good idea for reporters to enter by actual trickery rather than by blatantly pushing their way in with cameras rolling. The sort of thing I am talking about here is misrepresenting intentions or identity. The case is *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd* where Channel Nine broadcast a segment on its television programme, 'A Current Affair,' intended to expose the allegedly incompetent building practices of a company. A Nine journalist and producer pretended to be interested in building a home to gain access to the business premises with cameras and confronted a managing director and franchisee of the company. The footage obtained was later broadcast together with the testimony of dissatisfied customers.

8. Although a claim in defamation failed because the media were able to rely on truth, a claim by the company for trespass to land was successful.¹ Neither the public interest in the programme nor the substantial truth of the imputations made in the programme was

¹ Awards of \$60,000 in general damages, \$50,000 in aggravated damages and \$120,000 in exemplary damages to the managing director were reduced on appeal.

relevant to the conduct constituting the trespass. The programme makers had good interviews with persons who complained about building work performed by the company. The ability to broadcast extra footage of a direct confrontation with the alleged guilty party enhanced the entertainment value of the programme, but was found not to enhance the public interest or the truth of the imputations.

9. There is no general public interest defence to trespass. However, there is ambiguous authority in New Zealand about this. The leading case is still *TV3 Network Services Ltd v. Fahey*. A former patient, encouraged by TV3, entered the surgery of a doctor whom she accused of sexual misconduct, and filmed the interview with a hidden camera. The Court of Appeal had little doubt that this was a trespass but, noting the importance of freedom of information, refused an injunction against the showing of the film. It relied on three things. First, an examination of the context and circumstances showed that the filming was an 'understandable pre-emptive course of action' given that the doctor had cast doubt on the patient's credibility. Second, the public interest had to be weighed in the balance: the doctor was a public figure, and the law recognises a public interest in the exposure of misconduct. Third, the court concluded that damages would be an adequate remedy.

10. The court emphasised that generally the public importance of the information cannot excuse the media's transgressing the law to obtain it. But Richardson P also said,² 'It is not in dispute that in principle the law of New Zealand recognises that a public interest ... defence or justification is available in appropriate cases where the information has been obtained unlawfully or tortiously.' And in *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd*, the New South Wales Court of Appeal implied that if the matter of public interest was related to the conduct constituting the trespass, a defence might exist (it was not in that case).

11. The second aspect of *Ilvari* which is interesting is that a claim under the Australian equivalent of our Fair Trading Act 1986, which imposes strict liability for false statements made 'in trade', was also successful. The New Zealand legislation provides: 'No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' This provision is aimed mainly at advertisers and business people who induce customers to deal with them by falsely representing their product or service. Liability is absolute—that is to say it does not depend on negligence or deliberate fraud. Thus, even innocently made

² [1999] 2 NZLR 129 at 136.

misrepresentations can be an infringement of the section. Possible remedies include damages and injunction.

12. There might be media liability under the Act in respect of false items of information contained in material such as articles and news bulletins. However, the New Zealand Act includes saving provisions in s 15, which exempt the publication of any non-advertising or promotional information or matter in newspapers by publishers, and provides identical protection for broadcasting bodies. Section 15 has been called 'the publisher's exception'.

13. The question is whether the legislation could capture use of subterfuge or misleading statements by media when *gathering* information. *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd* suggests so. In that case, claims for false and misleading conduct under the Trade Practices Act 1974 were successful as well as the trespass claims. The New South Wales Court of Appeal held that the false and misleading conduct did occur in the course of trade and commerce because even if it was not in the trade of the media making the representations, it was in the trade of the persons to whom the statements were made – the builders – since the communications were intended to acquire the services of the builders. The Australian legislation exempts 'prescribed publication of matter by a prescribed information provider'. Prescribed publication is publication made in the course of carrying on a business of providing information. The media defendants were not able to use the exemption because statements made in the course of a media investigation did not amount to publication. They were made for the purposes of obtaining information which would eventually be published, but did not actually amount to the publication itself.

14. Arguably the New Zealand legislation could be interpreted to the same effect. Imagine a case where a person is lured into discreditable conduct by an actor pretending to be someone else, and is secretly filmed doing so. If the media company was actively involved in the pretence, there might also be a breach of the Fair Trading Act. Section 9 would be satisfied because news-gathering is an integral part of journalism, without which publication of material could not occur. If this failed, perhaps because of an argument that dissembling can never be seen as a valid feature of journalism, then *Ilvari* suggests that the trade of the person filmed could be relevant; thus the actor would be making statements in the course of the trade of the subject of the ruse, not the dissembling journalist. Although s 9 has been

interpreted broadly in New Zealand, interpreting the provision in the light of the trade of the party affected by the misrepresentation would represent a new direction in the law.

15. As to the exemption in s 15, it might not be satisfied for the same reasons as arose in *Ilvari* – the exemption for newspapers and broadcast media applies only to *publication* of matter. The gathering of information using subterfuge is not publication, although connected with it as an ultimate outcome.

16. To conclude then, activities involving subterfuge to obtain stories are always risky. Even if trespass or the Fair Trading Act are not used, a complaint to the BSA would be likely to be successful, as might a complaint to the Press Council.